

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,
Plaintiff-Appellee,

v.

CHRISTINE ANN KERN,
Defendant-Appellant.

SUPREME COURT NO. 11-1208

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE ARTIS REIS, JUDGE (SUPPRESSION)
HONORABLE DOUGLAS F. STASKAL, JUDGE (TRIAL)
HONORABLE ROBERT B. HANSON, JUDGE (SENTENCING)

APPELLANT'S REPLY BRIEF AND ARGUMENT



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ROUTING STATEMENT

Transfer to the Court of Appeals would not be appropriate as this case presents substantial constitutional questions and questions of enunciating or changing legal principles. Iowa R. App. P. 6.1101(2)(a), (f) (2009).

ARGUMENT

I. DEFENDANT KERN'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES AS GUARANTEED BY THE FOURTH AMENDMENT AND ARTICLE I, SECTION 8 OF THE IOWA CONSTITUTION WAS VIOLATED BY THE WARRENTLESS SEARCH OF HER HOME.

Preservation of Error: Kern stands by her originally stated preservation of error and the State concedes that Defendant Kern preserved error on this claim for review.

Standard of Review: Kern stands by her originally stated standard of review and the State agrees that the review is de novo.

Discussion: "A parolee may not be subjected to broad, warrantless searches by a general law enforcement officer without any particularized suspicion or limitations to the scope of the search" because the Iowa Constitution recognizes "the security and sanctity interests of parolees in their home." *State v. Ochoa*, 792 N.W.2d 260, 291 (Iowa 2010).

A. Defendant Kern Did Not Waive Her Constitutional Rights By Signing a Parole Agreement

The State relies solely upon United States Supreme Court precedent to argue that Defendant Kern gave consent to the search of her residence by signing her parole agreement after it was clearly explained to her. This argument overlooks Iowa's "proud tradition of concern for individual rights

[for which] this court ‘should not be reluctant to show greater sensitivity to the rights of Iowans under our constitution than the Supreme Court accords to their rights under the Federal Constitution.’” *State v. Ochoa*, 792 N.W.2d 260, 266 (Iowa 2010) (citing *State v. Roth*, 305 N.W.2d 501, 510–11 (Iowa 1981) (McCormick, J., dissenting)). Further, this Court rejected *Samson* under the Iowa Constitution in *Ochoa*, finding the scope of the search in *Samson* was not “strictly tied to and justified by the circumstances,” permitted unbridled discretion which the Fourth Amendment and article I, section 8 were designed to avoid, and that *Samson* was “fundamentally flawed by regarding a parolee as more akin to a prisoner than a probationer.” *Id.*, at 288–90.

As this Court explained in *Ochoa*, finding that signing a parolee waives their constitutional rights by signing a parolee agreement is a “stunningly broad” power. In that case, the Court postured that a person on parole for an alcohol-related crime—like Kern in this case—“could be subject to warrantless searches of books, records, diaries, invoices, and intimate surroundings” and declared that such an invasion is not minimal and highly-defined, nor closely-linked to an identified special need. *State v. Ochoa*, 792 N.W.2d 260, 287–88 (Iowa 2010). As the Court reasoned in *Ochoa*, examining a parole agreement with the very same language, a

parolee does not waive their right to be free from unreasonable searches and seizures under article I, section 8 of the Iowa Constitution.

B. Probable Cause Is the Standard for Searching a Home

The Court in *Ochoa* explicitly left open the question of “whether individualized suspicion amounting to less than probable cause may be sufficient in some contexts to support a focused search.” *State v. Ochoa* 792 N.W.2d 260, 291 (2010). Probable cause should continue to be the appropriate standard; in Iowa, “the fact that a criminal accused is also a parolee should not destroy or diminish constitutional safeguards afforded to all people.” *State v. Cullison*, 173 N.W.2d 533, 539 (Iowa 1970). This is especially important where the search is of the home because of “the security and sanctity interests of parolees in their home.” *State v. Ochoa*, 792 N.W.2d 260, 291 (Iowa 2010). “While the current United States Supreme Court has dramatically scaled back Fourth Amendment protections, it has repeatedly emphasized the sanctity of the home as being at the core of Fourth Amendment protections.” *State v. Lowe*, 10-1454, 2012 WL 163027 at *22 (Iowa Jan. 20, 2012) (Appel, J., Concurring).

C. Detectives Jenkins and Chance Did Not Have Reasonable Suspicion to Search the Home Without a Warrant

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw

from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.

State v. Lowe, 10-1454, 2012 WL 163027 at *22 (Iowa Jan. 20, 2012)

(Appel, J., Concurring) (quoting *Johnson v. United States*, 333 U.S. 10, 13–14, 68 S. Ct. 367, 369, 92 L. Ed. 436, 440 (1948)).

The State begins its argument that the detectives had reasonable suspicion to conduct a warrantless search by misquoting *State v. Ochoa*. The Court held “a parolee may not be subjected to broad, warrantless searches by a general law enforcement officer without any particularized suspicion or limitations to the scope of the search.” There is not mention of *Knights* nor of a parolee's diminished expectation of privacy near the referenced portion of the opinion.

The State then asserts that the United States Supreme Court in *Illinois v. McArthur* held that the same circumstances that lead us to infer reasonable suspicion is “constitutionally sufficient” also renders warrants unnecessary. Appellee's Brief, p. 20. In *McArthur*, the police secured a warrant before searching the home. The issue in that case was whether “[p]olice officers,

with probable cause to believe that a man had hidden marijuana in his home, prevent that man from entering the home for about two hours while they obtained a search warrant” violated his Fourth Amendment rights. *Illinois v. McArthur*, 531 U.S. 326, 328, 121 S. Ct. 946, 948, 148 L. Ed. 2d 383 (2001).

McArthur is distinguishable for a number of reasons: (1) the officers obtained a warrant to search the home; (2) the information came from a known source—defendant’s wife who had firsthand opportunity to observe her husband—as opposed to an anonymous tip; (3) the contraband at issue was a small stash of marijuana that could have been quickly disposed of; (4) the police “neither searched the trailer nor arrested McArthur before obtaining a warrant . . . [t]hey left his home and his belonging intact—until a neutral Magistrate, finding probable cause, issued a warrant”; (5) the officers imposed the restraint for a limited period of time.

In the case at hand, the officers did not obtain a warrant, the information came from an anonymous tip to the department of human services, the allegation was of a marijuana grow operation, and the officers intruded into the home, which plays a “central role in a person’s life, providing sanctuary, comfort, seclusion, security, and identity.” *State v.*

Ochoa, 792 N.W.2d 260, 289 (Iowa 2010) . Such invasion by government officials “cannot be regarded as constitutionally insignificant.” *Id.*

The detectives relied upon the following circumstances for believing they had reasonable suspicion to conduct a warrantless search of the home: an anonymous, uncorroborated tip to the department of human services and the occupant’s refusal to consent to a search. In *Sierra v. Delaware*, the Delaware Supreme Court examined a similar case where the probation officer received information from an unidentified department of justice employee that the defendant had drugs in his residence. 958 A.2d 825, 827 (Delaware 2008). Like Kern, the defendant signed an agreement that he was subject to a search of his person, living quarters and/or vehicle without a warrant at any time by a probation/parole officer.” *Id.* at 828. The Delaware Supreme Court suppressed the evidence because the “informant must have actual knowledge of illegal activity, not just identity, location and probationary status.” The Court emphasized that when an informant’s identity and motive are unknown, it must be assumed that the informant has something to gain by making a complaint against the defendant. *Id.*

The second circumstance the detectives relied upon was Kern and Grant’s refusal to consent to a search. Detective Chance testified “[w]e felt that if someone is going to deny us consent on a report of a possible

marijuana grow in a residence just for us to look around and if there is actually nothing there, nothing to hide, no one would typically deny you consent.” (Supp. Tr. p. 50 lines 9–18)(App. 042). Similarly, Detective Jenkins testified “had it been an unfounded allegation, they probably would have let us come in search, make sure there was nothing wrong, and the child could stay in that home . . . If it were my residence and it was my children, I’d have no problem allowing them in.” (Supp. Tr. p. 69 line 19–p. 70 line 2)(App. 049–050). However, refusal to consent cannot be used to support probable cause because “such use denies the defendant’s Fourth and Fifth Amendment rights. *State v. Ripperger*, 514 N.W.2d 740, 746 (Iowa Ct. App. 1994) (citing *United States v. Thame*, 846 F.2d 200, 207 (3d Cir.), *cert. denied*, 488 U.S. 928, 109 S. Ct. 314, 102 L.Ed.2d 333 (1988)); *see also United States v. Freeman*, 479 F.3d 743, 749 (10th Cir. 2007) (“Refusal to consent to a search—even agitated refusal—is not grounds for reasonable suspicion”).

II. THE DISTRICT COURT ERRED IN FINDING THAT THERE WAS SUFFICIENT EVIDENCE IN THE MINUTES OF TESTIMONY TO ADJUDGE DEFENDANT GUILTY OF THE CHARGES

Preservation of Error: Kern stands by her originally stated preservation of error and the State concedes that Defendant Kern preserved error on this claim for review.

Standard of Review: Kern stands by her originally stated standard of review and the State agrees that the review is de novo.

Discussion: Kern maintains that there was not sufficient evidence in the minutes of testimony to find her guilty of the charges. Kern reasserts her positions previously detailed in Appellant's brief.

CONCLUSION

Defendant-Appellant Kern respectfully requests this court overturn the judgment and sentencing of the District Court, and her conviction be vacated.


REQUEST FOR ORAL ARGUMENT

Defendant-Appellant Kern respectfully requests oral argument in this matter.

Respectfully Submitted,

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ATTORNEY'S COST CERTIFICATE

We, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Reply Brief and Argument was \$ 81.62, and that amount has been paid in full by the undersigned.

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Dated: March 12, 2012

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CERTIFICATE OF SERVICE AND CERTIFICATE OF FILING


I hereby certify that the above brief was served on Defendant-Appellant by placing one copy thereof in the United States Mail, proper postage attached, addressed to Christine Ann Kern, No. 1113085, Iowa Correctional Institution for Women, 300 Elm Avenue, SW, Mitchellville, IA 50169 on March 14, 2012.

I certify that the above brief was served upon the Attorney General's Office, Criminal Appeals Division by placing one copy thereof in the United States Mail, proper postage attached, addressed to Attorney General's Office, Criminal Appeals Division Hoover Building, 2nd Floor, Des Moines IA 50319, on March 14, 2012.

I further certify that on March 14, 2012, I will file this document by hand delivering eighteen copies of it to the Clerk of the Supreme Court, Iowa Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa 50319.

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